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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,
VS.
CHARLES T. VON DER AHE and
CHROMA LIGHTING,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Rule 29.1 Listing

Petitioner refers to the Rule 29.1 listing in its Petition for Writ of Certiorari.

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I.

Respondent labors mightily to explain why the Ninth Circuit correctly held that the Robinson-Patman Act does not require proof of injury to competition in secondary-line cases. According to Respondent, the statute is not really an antitrust law at all, but a federalized unfair trade practices act in which Congress — sensibly or otherwise — made harm to particular traders, rather than harm to the competitive process or to consumer welfare, the touchstone of liability.

But those arguments respond to a different question than the one presented by the current petition. The question now is not whether the Ninth Circuit correctly resolved the issue of injury to competition in secondary-line Robinson-Patman cases, but simply whether that issue is a matter which commands the attention and resources of this Court.

That issue is not addressed by whether the Ninth Circuit "got it right" — linguistically, economically or as a matter of competition policy — but by whether the issue matters and whether this Court's consideration of it is necessary to set things straight. The answer to both those questions is "yes".

As Sylvania explained in its Petition, the distribution of goods of every type and in every corner of the country is affected by whether manufacturers may price their products in a welfare-maximizing fashion so long as doing so furthers, rather than harms, competition. The importance of resolving that question in a manner that is both uniform and definitive is, we believe, self-evident. Its importance is further underscored by the range of economic interests that have joined Sylvania as *amici curiae* in urging that *certiorari* be granted.

Equally clearly, only this Court can resolve the underlying legal question presented by this case. For all of Respondent's elaborate rhetoric about the clear language and purport of the statute, if this Court denies Sylvania's petition, the law will remain in an acknowledged state of uncertainty regarding which view of the Robinson-Patman Act is correct: that of the D.C. Circuit,[1] or that of the Third Circuit[2] and the Ninth Circuit in this case[3]. Moreover, only this Court can say whether its holding in *Brooke Group*[4] — that the very same statutory language which is at issue in this case requires proof of harm to *competition* — should, for some reason, be limited to primary-line cases.

The number of recent court of appeals opinions which have addressed the "injury to competition" question in secondary-line cases demonstrates the recurring and pervasive character of the issue. The diversity of views among, and within, those courts shows not only the difficulty of the issue but that the conflict is deeply enough imbedded that it will not be resolved short of consideration by this Court. What is more, we believe that this case presents an appropriate opportunity for the Court to consider

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[1] Together with the Second, Eighth and Tenth. *See Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *H.L. Hayden Co of N.Y., v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984).

[2] And the Eleventh, see *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990), and *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

[3] Though not in *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983). *See* Pet. at 7 n.7.

[4] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

and resolve the issue which it left open in *Brooke Group* concerning the application of that decision to secondary-line cases.

II.

Respondent obviously — if reluctantly — recognizes that the issue here is not outcome, but suitability for review. Thus, he half-heartedly offers up three arguments for why review is unnecessary. None is persuasive.

First, Respondent says that there is not really a conflict at all. Opp. at 11-14. But if that is true, it certainly escaped notice by the Ninth Circuit. That court understood that it was being called upon to consider an issue that was left unresolved by this Court in *Morton Salt*[5] and to choose between the competing views of at least the D.C. and Third Circuits: "The question presented by Sylvania's appeal ... was left open by *Morton Salt*, and the circuits are divided on the issue." App. at 4a-5a. The Ninth Circuit further acknowledged the D.C. Circuit's conclusion that "the language of the Robinson-Patman Act ... indicates that Congress was concerned about the preservation of competition, and not the protection of competitors." App. at 6a (quoting *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1143 (D.C. Cir. 1988)). But, siding with the Third Circuit and Judge Mikva, it held that this language "expresses Congressional intent to protect individual competitors, not just market competition,

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[5] *FTC v. Morton Salt*, 334 U.S. 37 (1948).

from the effects of price discrimination."[6] App. at 9a.

Second, Respondent insists that Sylvania's petition does not present an issue worthy of this Court's attention because he did not rely on the *Morton Salt* inference alone to establish that Sylvania's pricing practices damaged his business. Thus, he notes that, in addition to offering evidence that Sylvania extended substantial price discounts to his competitors, he presented evidence that he "lost sales and profits" as a result of Sylvania's pricing practices. That evidence, he insists, renders the issue framed by Sylvania's petition irrelevant. Opp. at 6-9.

But, again, the point does not remotely obviate the need for review. To be sure, as Respondent notes, the sufficiency of his proof of injury to his business is no longer a matter of dispute. Sylvania challenged his showing before the district court and the Ninth Circuit, arguing that he had failed to prove either a substantial price difference over time or lost sales and profits. In the end, the Ninth Circuit rejected Sylvania's arguments, finding his evidence of injury to his business sufficient. But, the finding that Sylvania's practices damaged Respondent's business simply sets the stage for the ultimate legal question: whether proof of injury to an individual

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[6] This also disposes of what Respondent styles as an additional argument against consideration of this issue by the Court: that Sylvania has not identified an error in the lower courts because it was permitted to offer evidence that its pricing practices did not injure competition. Opp. at 14-18. Although the district court allowed Sylvania to introduce its evidence, the Ninth Circuit refused to consider it, holding that "the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." App. at 13a.

competitor conclusively establishes the requisite injury to competition. That is the question Sylvania asks this Court to decide.

Third, Respondent says that Sylvania and its *amici* have come to the wrong place: that their explanations about economic inefficiency and the like should be addressed to Congress, rather than this Court. But the proper interpretation and application of statutes is quintessentially a judicial function. Moreover, it is a function that is a particular hallmark of antitrust enforcement. Our Nation's competition laws are written largely in the rhetoric of generalized policy goals, precatory exhortations to keep our economy operating freely. Indeed, this Court has noted that to interpret Section 1 of the Sherman Act literally would be to stop all commerce in its tracks,[7] and that the very constitutionality of the act is preserved from fatal uncertainty only through the edifying gloss of judicial interpretation.[8] Virtually every element of antitrust jurisprudence — including the *per se* rule, the rule of reason, the "pass-on" defense, the ebbing and flowing significance of efficiencies, and the pertinence of harm to competition rather than competitors — is a product of judicial interpretation. While the Robinson-Patman Act is modestly more detailed in its language, that fact did not, for example, obviate the Court's consideration of the interplay between harm to competition and competitors in *Brooke Group*.

Litigants disappointed with the provisions or application of a statute can, always, seek redress from the Legislature. But that is no substitute for obtaining

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[7] *See, e.g., United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

[8] *See Nash v. United States*, 229 U.S. 373, 377 (1913).

definitive judicial guidance on the requirements of a particular enactment. The appropriateness of judicial review, in this case, is no less apparent than in *Brooke Group* or the innumerable other antitrust cases which have given shape to this country's competition policy. The abundance of conflicting opinions of the courts of appeals (and district courts) on the issue raised by Sylvania are testament not only to the legitimacy of judicial involvement but to its necessity. Congress — like Heaven — can wait.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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